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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. [redacted] 3

STATE OF MISSOURI, Creditor, Petitioner, vs. JOHN T. ROSS, Trustee, et al., Respondents.	Circuit Court of Appeals, Eighth Circuit, Nos. 10,239 and 10,281.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 782.

STATE OF MISSOURI, Creditor, Petitioner, vs. JOHN T. ROSS, Trustee, et al., Respondents.	Circuit Court of Appeals, Eighth Circuit, Nos. 10,239 and 10,281.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI.

I.

OPINIONS.

Petitioner's statement, under its title, at page 10 of its brief, is adopted by the respondents, except that the opinion of the United States Circuit Court of Appeals (Eighth Circuit) has been reported in 80 Fed. (2d) 329.

II.

JURISDICTION.

(a) **Statutory Provision.** It is admitted that the statutory provision relating to certiorari is correctly set out in paragraph (a) of subdivision II of petitioner's brief.

(b) **Date of Decree.** It is admitted that petitioner's petition for certiorari was filed as set forth in paragraph (b) of subdivision II of appellant's brief.

(c) **Nature of Case.** Petitioner, under this paragraph of subdivision II of its brief, states that "the United States Circuit Court of Appeals, Eighth Circuit, in the instant case, holds that the equitable or quasi lien claimed by petitioner to be an attribute of the state taxes is not enforceable in bankruptcy." The opinion of the Court held that the claim of the State of Missouri was not a lien, equitable, quasi or otherwise, and that Section 64-b of the Bankruptcy Act (11 U. S. C. A. 104-b) placed all taxes—United States, state, county, district or municipality—upon a basis of equality.

(d) **Cases Sustaining Jurisdiction.** Under this paragraph of subdivision II of petitioner's brief, counsel cites three cases. However, certiorari is not a writ of right, but its issuance is discretionary.

Ireland v. Woods, 246 U. S. 323, l. c. 328;
Twitchell v. Pennsylvania, 7 Wall. 321;
Philadelphia & R. Coal and Highway Co. v. Gilbert, 245 U. S. 162.

III.

FACTS.

The facts as set forth under subdivision III of petitioner's brief are admittedly correct.

SUMMARY OF ARGUMENT.

I.

(a) Section 3466, U. S. Revised Statutes, does not establish a lien, but merely provides for the priority of payment of certain debts due the United States.

U. S. v. Fisher (1804), 2 Cranch 358, 2 L. Ed. 304;
Beaston v. The Farmers Bank of Delaware (1838), 12 Peters 102, 9 L. Ed. 1017.

(b) The construction of Section 3466 by the United States Supreme Court was adopted by the State of Missouri, along with the statute in 1881.

General Box Co. v. Mo. Utilities, 331 Mo., l. c. 857, 55 S. W. (2), l. c. 447.

II.

The general provisions contained in Section 3466 (Title 31, Sec. 191, U. S. C. A.) and in the similar Section 3152, R. S. Mo. 1929, are superseded by the specific provisions dealing completely with one subject.

Cook County National Bank v. U. S., 107 U. S. 445, 27 L. Ed. 537, 2 Sup. Ct. 561;
In re Holland Banking Co., 313 Mo. 307, 281 S. W. 702;
State v. Farmers Exchange Bank, 331 Mo. 689, 56 S. W. (2d) 129;
In re Slonka, 122 Fed. 630.

III.

The Bankruptcy Act takes into consideration the whole range of indebtedness of a bankrupt and the order of payment to creditors.

Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706;
Davis v. Pringle, 268 U. S. 315, 69 L. Ed. 974, 45 Sup. Ct. 352;
Reese v. U. S., 75 Fed. (2d) 9;
In re Inland Dredging Corporation, 61 Fed. (2nd) 765;
In re Lewis, 99 Fed. 936;
In re Vidal, 233 Fed. 733;
In re Rouse, Hazard & Co., 91 Fed. 96.

IV.

Under Section 64b, Paragraph 6, all taxes, whether due to the United States, state, county, district or municipality, are placed on a parity.

New Jersey v. Anderson, 203 U. S. 483, 51 L. Ed. 284, 27 Sup. Ct. 137;
In re A. J. Waterman Mfg. Co., 291 Fed. 589;
In re A. E. Fountain, Inc., 295 Fed. 873;
City of Waco v. Bryan, 127 Fed. 79;
Dallas v. Ryan, 22 A. B. R. (N. S.) 378;
In re Wyley, 292 Fed., l. c. 902.

ARGUMENT.

I.

(a) Section 3152, R. S. Mo. 1929, under which petitioner claims an equitable or quasi lien, is modeled after Section 3466, U. S. Revised Statutes.

In the early case of U. S. v. Fisher, 2 Cranch 358, 2 L. Ed. 304, the Court held that Section 3466, U. S. Revised Statutes, did not establish a lien, but only a priority in payment. The Court, in part, said:

> "On this subject it is to be remarked that no lien is created by this law (now 3466); no bona fide transfer of property in the ordinary course of business is overreached. It is only a priority in payment, which, under different modifications, is a regulation in common use, and this priority is limited to a particular state of things when the debtor is living, although it takes effect generally when he is dead."

In Beaston v. Farmers Bank of Delaware, 12 Peters 102, 9 L. Ed. 1017, the evidence showed that Beaston owed the Elkton Bank $500.00 on a judgment; that both the United States and the Farmers Bank had obtained a judgment against the Elkton Bank, an insolvent institution, and that the Farmers Bank attached the money in Beaston's hands owing to the Elkton Bank in 1830; the United States doing likewise in 1831. Beaston paid the United States, contending that under the fifth section of the Act of 1797 (now 3466) the United States had priority to the money. In denying the priority of the claim of the United States the Supreme Court, in part, said:

> "From the language employed in this section and the construction given to it from time to time by this

Court, these rules are clearly established: first, that no lien is created by the statute."

(b) The construction of section 3466 by the United States Supreme Court was adopted by the State of Missouri along with the statute in 1881.

In a recent decision, General Box Co. v. Missouri Utilities, 331 Mo., l. c. 857, the Missouri Supreme Court held that:

> "The law is well settled that when one state adopts a statute of another state which the courts of that state have construed, then such construction will be held to have been adopted along with the statute."

II.

In the Cook County National Bank Case, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537, the Treasury Department held bonds of an insolvent bank to secure its circulating notes, and after selling the bonds and applying the proceeds to redeem the notes, had on hand $30,000 to the bank's credit. The bank, however, owed the Government $20,000 for postal funds and money order funds deposited with it by the Post Office Department. The question was whether under the provisions of 3466 the Government's claim had priority over general claims. In holding that the provisions of 3466 did not apply, for the reason that the National Banking Law was a complete system for the establishment and government of national banks, and was neither limited nor enlarged by other statutory provisions, the Court, in part, said:

> "These provisions (dealing with the liquidation of insolvent national banks) must be deemed, therefore, to withdraw national banks, which have failed, from

the claims of insolvent persons out of whose estates demands of the United States are to be paid in preference to the claims of other creditors. The law of 1797, re-enacted in the Revised Statutes giving priority to the demands of the United States against insolvents, cannot be applied to demands against those institutions. The provisions of that law and of the National Banking Law, being, as applied to national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine as to repugnant provisions of different laws is well settled and has often been stated in decisions of this Court. A law embracing the entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of the general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature, and although as a general rule, the United States are not bound by the provisions of a law in which they are not expressly mentioned, yet, if a particular statute is clearly designed to prescribe the only rules which should govern the subject to which it relates, it will repeal any former one as to that subject."

The Supreme Court of Missouri followed this principle in the Holland Banking Case, 313 Mo. 307, 281 S. W. 702. The Court held that the provisions of the general priority statute, now 3152, were superseded as to the state funds in an insolvent bank by the state depository law, saying, in part:

"We are satisfied that the decided trend of the better reasoned cases is to the effect that where a state has a general statute, giving priority to the debts due the state, and where such state also has a depository

law directing the deposits of the state's funds in selected depositories, which are required to give full and adequate security equal to or in excess of such deposits as may lawfully be made therein, and where no preference over and above the protection of such security is specifically provided for in such depository law, the state will be deemed to have waived its priority rights under the general priority statute."

Again, in State v. Farmers Exchange Bank, 331 Mo. 689, 56 S. W. (2) 129, the Court held that the priority provided by Section 3152 was superseded by "a comprehensive and complete scheme * * * for the liquidation in the distribution of their assets when insolvent * * *. In that statute we find provisions relative to preferences to the state, which we think clearly show an intent on the part of the Legislature to waive any priority which otherwise might have been claimed by the state under the prior general statute."

III.

In Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706, a surety who was subrogated to the rights of the United States claimed that by reason of Section 3466, R. S., its claim had priority over labor claims. In denying this contention, the Supreme Court, in part, said:

"The Bankruptcy Act of 1867, as we have seen, provided for priority, first, for the payment of expenses, and, second, of 'all debts due to the United States and all taxes and assessments under the laws thereof.' The priority therefore given by the Bankruptcy Act was coextensive with the priority given by the Statute of 1797. In other words, to repeat, there was a reaffirmation by the Bankruptcy Act of the

Statute of 1797, but there is not such affirmation by the Bankruptcy Act of 1898 of that statute, which still exists, as we have said, as Section 3466 of the Revised Statutes. There is a change of provisions, and we come to the question if there is a change of purpose * * *. A different order is prescribed by the Act of 1898 and something more. Labor claims are given priority, and it is provided that the debts having priority shall be paid in full. The only exception is 'taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality.' These are civil obligations and not personal conventions, and preference was given to them, but as to debts, we must assume a change of purpose in the change of order, and we cannot say that it was inadvertent. **The act takes into consideration, we think, the whole range of indebtedness of a bankrupt—national, state and individual—and assigns the order of payment.** The policy which dictated it was beneficial and well might induce a postponement of the claims, even of the sovereign, in favor of those who necessarily depend upon their daily labor, and to give such claims priority could in no case seriously affect the sovereign."

In Davis v. Pringle, 268 U. S. 315, 45 Sup. Ct. 352, 69 L. Ed. 974, the Court held that the term "person" contained in Paragraph 5 (now 7) of Section 64-b of the Bankruptcy Act did not include the United States. The Court, however, in leading up to the main question, said:

"**It may be assumed that the priority must be found, if at all, in the Bankruptcy Act, and in its supposed incorporation of Revised Statute 3466.** That act, as was said in Guaranty Title & Trust Co. v. Title Guaranty & Surety Co., 224 U. S. 152, takes into consideration * * * the whole range of indebtedness

of the bankrupt—national, state and individuals—and assigns the order of payment."

This principle was followed in the case of Reese v. U. S., 75 Fed. (2) 9, where it is said:

> "It may be true, as it is contended, that a general judgment lien, not levied on specific property before the date of insolvency, cannot stand against the priority given the United States, where section 191 (3466) controls, but here the Bankruptcy Act controls, and it is held to have superseded the priority statute in cases of bankruptcy."

This principle is further established in the case of In re Inland Dredging Corporation, 61 Fed. (2d) 765, wherein the Court says:

> "We do not of course mean that a state statute may control the distribution of bankrupt estates. The priority arises under section 64b (7), which incorporates the state law pro tanto; and the hierarchy of claims—the order of their priority—is fixed by that section. Hence we ignore the provision of section 130 that premiums shall be paid immediately after claims for wages. They take their place in the order prescribed by section 64b (7), regardless of where section 130 puts them."

In re Slonka, 122 Fed. 630, holds that "no principle of statutory construction is better settled than that which displaces the application of general provisions to a particular subject when there are specific provisions applicable to it in the same act."

In the matter of **Lewis, 99 Fed. 936**, the Court says:

> "In other words, although the laws of a state giving priority to certain debts are by section 64b, class 5

(now 64b, class 7), introduced into the scheme of the present Bankruptcy Act, yet such state laws are so introduced only so far as to the debts to which they give priority are not expressly dealt with as to priority in the Bankruptcy Act itself. Where both a state law and the Bankruptcy Act give priority to the same class of debts the Bankruptcy Act not only controls the state law in the case of absolute conflict between the two, but by its express regulation of its priorities, excludes the state law altogether."

And, in the case of **In re Consumers Coffee Co.**, 18 A. B. R. 500, the Court said:

"Even if a lien, properly so called, exists under the Pennsylvania statute for rent in arrears at the time when the proceedings in bankruptcy were begun, the statute cannot override the act of Congress. While the priority of the landlord's claim is undoubtedly preserved in clause (b) (5) of section 64, this priority is not over all other claims whatever, but only over those that are not specified in the section as being even higher in right. The order of distributing the assets of a bankrupt having thus been expressly laid down by Congress, that order must be followed by the federal court * * *."

IV.

Taxes due and owing by the bankrupt to the United States, state, county, district or municipality are assigned to payment in sixth position under paragraph (b) of Section 64, 11 U. S. C. A. 104-a, and payment is provided for upon an equality and "without distinction."

This Court, the various courts of appeals and district courts seem to be in complete harmony and agreement upon this question. This Court, in **New Jersey v. Anderson**, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284, said:

> "The requirement of the present law is a wide departure from the Act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the state, county, district or municipality."

The Circuit Court of Appeals, Fifth Circuit, in **City of Waco v. Bryan**, 127 Fed. 79, said:

> "The present bankruptcy law gives priority for all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors. In short, it puts taxes due the state, counties and municipalities upon the same footing as taxes due the United States."

The same court, in **Dallas v. Ryan**, 22 A. B. R. (N. S.) 378, says:

> "Section 64 gives the rule for paying out the money derived from the bankrupt's property which remains for general distribution after all special liens and encumbrances have been dealt with."

Valid liens on the bankrupt's property are to be first satisfied; next, the priority claims mentioned in section 64 are to be paid, then any balance remaining is to be distributed as dividends to general creditors. Section 64, as amended by the Act of May 27, 1926, divides the priority items into seven classes, numbers them 1 to 7, and requires payment in the order in which they are thus numbered. Class 6 provides for "all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality." "Debts owing to any person by the laws of the states or the United States are entitled to priority," are seventh, and last, in the order of payment.

The case of **In re A. J. Waterman Mfg. Co.**, 291 Fed. 589, involved the question of priority between a claim of the United States for taxes and a claim of the City of Portland for taxes. The Court said:

> "Subsection 'a' of Section 64 of the Bankruptcy Act puts all taxes in one class, and in a class prior to all claims enumerated in section 'b.' I cannot sustain the contention of the United States that the United States has priority in the matter of taxes over the City of Portland. That section is distinct in putting all taxes upon an equality. For the reasons which I have given, I allow the claims for the administration of the estate to have priority over the taxes. I allow, also, the expenses of the common-law assignees in preserving the estate to have priority over the claims for taxes, they being found to be beneficial to the estate. After allowing priority to such claims—namely, for administration for the benefit of creditors and for the services and disbursements of the common-law assignees in preserving the estate—there will remain the sum of $4,468.30 to be divided between the tax claims. I have instructed the Special Master to divide this sum in proportion to the amounts of the claims of the United States, and of the City of Portland, with interest. He has made this division. The allowance for taxes appears in the schedule of amounts allowed, filed with this opinion."

The Court here held that section 3466 was superseded by the Bankruptcy Act. Also, in the case of **In re A. E. Fountain, Inc.**, 295 Fed. 873, the Referee had ordered "the tax of the United States and the State of New York to be prorated and paid pari passu." In affirming this order the District Court said:

> "The taxes under the foregoing provisions of the Bankruptcy Act are not directed to be paid in any

precise order, although the United States is mentioned first. As the act carefully provides in subdivision b the order of payment of various items by placing them under separate numerals, it seems reasonable to contend that it would have done this in respect to taxes if Congress had intended any discrimination in priority between taxes due the United States and taxes due the states and **political subdivisions thereof.**"

CONCLUSION.

We believe that the above authorities overwhelmingly hold that the order of distributing the assets of a bankrupt has been expressly laid down by Congress; that the Bankruptcy Act supersedes Section 3152, Revised Statutes of Missouri 1929, and provides for the payment of the tax claims of the State of Missouri and the City of St. Louis upon a pro rata basis.

Petitioner has invited the Court's attention to the fact that, with the addition of new taxes, this question is becoming increasingly more important. If this be true, then we believe it all the more apparent that a municipality possessing only such taxing powers as are granted by the state, should be entitled to the protection afforded and established by the clear authority of the cases, to the end that upon its claim for taxes it will receive at least a pro rata payment. If the federal and state taxes are increasing, as the Attorney-General points out, then the municipality, limited as it is in the exercise of the taxing power, should, upon its proportionately smaller claim, be entitled to share pro rata.

The Court, in **In re Wyley**, 202 Fed., l. c. 902, said:

"Considering the dual nature of our Government,

and that neither the Union nor the states may destroy or hinder the other in several functions, and all have an equal need of their revenues, it is concluded that the intent of Congress was that there should be a pro rata payment upon all the taxes claimed in section 64 (a) when the available fund is not sufficient to pay, in full, the taxes due the United States, having no priority over the others * * *."

The authorities are uniformly and correctly opposed to the contentions of petitioner, and we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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